SUPREME COURT, U.S.
FILED
JUL 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1656

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEPHEN GOOT, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

ELLEN S. PODGOR
Attorney for Petitioner
5700 Collins Ave.
Apt. 10G
Miami Beach, FL 33104
Phone: (305) 868-3099
Counsel of Record

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....1

ARGUMENT:

I. THERE IS A VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN A UNITED STATES ATTORNEY APPOINTS A SUBORDINATE TO EFFECTUATE SCREENING OF A CONFLICT OF THE USA AND A DEFENDANT IS DEPRIVED OF AN EVIDENTIARY HEARING ON THE ISSUE OF DISQUALIFICATION OF THE UNITED STATES ATTORNEY'S OFFICE.....3

II. PETITIONER'S SENTENCE IS THE "EXCEEDINGLY RARE" CASE OF CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE REVERSAL IS MERITED..12

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES: Page

Cuttingham v. State, 469 N.E.2d 1, 7, 10, (Ind. App. Ct. 1984).....16

Solem v. Helm, 463 U. S. 277 (1983).....13, 14

Taylor v. State, 442 N.E.2d 1087, 1092 (Ind. 1982).....15

United States v. Catalanotto, 468 F.Supp. 503 (D. Arizona 1978).....8

United States v. Golumb, 764 F.2d 86 (2nd Cir. 1985).....19

United States v. Hutchins, 757 F.2d 11 (2nd Cir. 1985).....19

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS:

Indiana Code 35-38-1-7(b)(4).....15

Indiana Code 35-38-1-7(d)..... 15

Indiana Rules of Professional Conduct, Rule 1.11.....7

Indiana Rules of Professional Conduct, Rule 1.11(c).....5, 7

Indiana Rules of Professional Conduct, Rule 1.11(c)(1).....7

United States Constitution,
Fifth Amendment.....9, 11

United States Constitution,
Sixth Amendment.....9, 11

United States Constitution,
Eighth Amendment.....12

United States District Court
for the Northern District of
Indiana, Rule 1(f).....5, 6

OTHER REGULATIONS:

18 U.S.C. 3553(c).....18

AUTHORITIES:

1986 United States Department of
Justice, Bureau of Justice
Statistics, Source Book of
Criminal Statistics.....17

QUESTIONS PRESENTED FOR REVIEW

1. Is the defendant's right to counsel and right of due process pursuant to the Fifth and Sixth Amendments of the United States Constitution violated when the United States Attorney's Office prosecuting the defendant has as the United States Attorney for that office, the attorney who originally served as defense counsel for the defendant and defendant is not afforded the opportunity of a hearing on his Motion to Disqualify the United States Attorney's Office?

2. Is the defendant's right against cruel and unusual punishment pursuant to the Eighth Amendment of the Constitution of the United States violated when the maximum sentence is imposed against the defendant by the court and said sentence is grossly disproportionate to a more culpable co-

defendant, grossly exceeds other sentences imposed on similarly situated defendants, grossly exceeds unenacted sentencing guidelines and is imposed with no comment or rationale given by the trial court?

No. 89-1656

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEPHEN GOOT, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

Petitioner, STEPHEN GOOT, hereby replies to the Respondent, United States of America's Brief, and requests this court grant certiorari.

ARGUMENT

I.

THERE IS A VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN A UNITED STATES

ATTORNEY APPOINTS A SUBORDINATE TO EFFECTUATE SCREENING OF A CONFLICT OF THE USA AND A DEFENDANT IS DEPRIVED OF AN EVIDENTIARY HEARING ON THE ISSUE OF DISQUALIFICATION OF THE UNITED STATES ATTORNEY'S OFFICE.

Respondent-government argues in their Brief in Opposition that the Indiana Rules of Professional Conduct do not warrant recusal of an entire United States Attorney's Office, that case-law has not recused an entire office where one attorney is disqualified and that absent explicit prejudice being demonstrated by the Petitioner, there is no basis for contending a violation of the Fifth Amendment Due Process Clause and Sixth Amendment Right to Counsel Clause. (Resp. 6-13). These three (3) arguments, however, ignore Petitioner's contention that (a) the Indiana Rules of Professional Conduct were not the controlling applicable rules at the time of this case, (b) that all present

case-law involving a conflict of a superior attorney in an office require recusal of the entire office, and (c) defendant was deprived his due process rights of the Fifth Amendment in failing to receive a hearing on the issue of recusal, and Sixth Amendment right to counsel in that the USA remained as the superior in the office to the Acting (Assistant) USA.

(A) Respondent argues that the Rules of Professional Conduct, specifically the commentary to Rule 1.11(c) support the practice of not disqualifying the entire USA's office. (Resp. 10). It is Petitioner's position, however, that the Code of Professional Responsibility and not the Rules are the applicable standards for this case.

The general rules of the United States District Court for the Northern District of Indiana, Rule 1(f), states: "The standard

conduct for those admitted to practice in this court shall be the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this court sits, as amended from time to time by that state court, except as otherwise provided by the specific rules of this court." Petitioner argues that the Indiana Code of Professional Responsibility is the applicable ethical rules to be used for guidance in this matter, in that at the time of the disqualification of USA Richmond and the appointment by USA Richmond of John Hoehner as acting USA (October, 1985), the Code was in effect as the standards of conduct for attorneys in the State of Indiana. The Rules of Professional Conduct did not become effective in the State of Indiana until January 1, 1987.

Even if this court should find that the Rules of Professional Conduct are the controlling body of law, there is still error here. Rule 1.11 of the Indiana Rules of Professional Conduct prohibited a lawyer from participating "in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment." The Respondent argues that Rule 1.11(c) does not preclude disqualification, in that the comment to (c)(1) states that this "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." This Rule, perhaps, permits continued prosecution by the "agency," the Justice Department. It does not, however, authorize continued representation by that particular "office." It is further noted that this Rule does not address the present scenario, where the individual being

disqualified is the individual who maintains control over the office.

(B) Respondent cites to several cases (Resp. 13-14), that they claim support the lack of necessity for the recusal of the entire office. These cases, however, involve conflicts of an assistant prosecutor or assistant USA. The Petitioner's case, is not merely an attorney from the USA's office, but rather the USA himself, the superior individual who manages, controls and assigns cases within the office. This supervisor-subordinate conflict cannot be rectified through screening mechanisms. As noted in the numerous cases cited by Petitioner, cases involving superiors require recusal of the entire office as opposed to a mere recusal of the specific attorney. (Pet. 11-13). As noted in United States v. Catalanotti, 468 F.Supp. 503 (D.Arizona

1978), despite the fact that there is no transfer of information, the proper remedy is to disqualify the particular office of the United States Attorney where a conflict exists.

(C) The constitutional issue is not merely an ethical question as perceived by Respondent. (Resp. 13). The Petitioner's claims of ethical violations in conjunction with the failure to provide a hearing to Defendant on the practices of the United States Attorney's Office as administered by USA Richmond, resulted in the Fifth and Sixth Amendment violation.

Respondent argues that because of USA Richmond's disqualification there is no breach of a "Sixth Amendment duty of loyalty to Petitioner by switching sides to represent the prosecution." (Resp. 7). Petitioner does not agree with this basic premise of Repondent. Petitioner argues

that a breach of loyalty does exist, despite recusal, in that a supervisor of an office in maintaining that position of control over his or her employees, has not really effecutated a complete recusal. As such, the very essence of the USA Richmond remaining as the supervisor over his subordinate, the Acting USA, is a switching of sides that is inherently prejudicial to Defendant.

Additionally, the lack of opportunity provided to Defendant to present evidence and cross-examine witnesses to demonstrate the improper screening, previously noted by Defendant, violated his rights of due process. (Pet. 16). Respondent's argument that due process is not proven, in that Defendant-Petitioner has failed to show the passing on of confidential information to members of the prosecutor's team, is premised upon cases where lack of an

adverse effect to trial was not proven. (Resp. 9). This, however, presupposes that one is given the opportunity to show this adverse effect. In the case at bar, the denial of a hearing and the Seventh Circuit acceptance at oral argument of the rendition of practices as argued by AUSA Milner (Pet. 16), was inherently improper as a violation of his Fifth and Sixth Amendment rights.

Finally, Petitioner notes that the Seventh Circuit Court of Appeals accepted that Petitioner-Defendant had a fundamental right not to be deprived of liberty without due process of law and in his Sixth Amendment right to counsel. (Pet. 15; App. A-11). However, unrefuted by the government is the fact that the court then uses a balancing test as opposed to strictly examining this issue to resolve whether the failure to disqualify the

entire USA's office was warranted. (Pet. 16). This failure of the government of "sustaining public confidence in its high level of integrity by dealing fairly, both in fact and in appearance, with criminal defendants" (Pet. App. A-11) warrants review by this United States Supreme Court.

II.

PETITIONER'S SENTENCE IS THE "EXCEEDINGLY RARE" CASE OF CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE REVERSAL IS MERITED

In responding to Petitioner's argument that his sentence is violative of the Eighth Amendment of the United States Constitution, in that it is cruel and unusual punishment, the Respondent government argues that Petitioner's case is not one of the "exceedingly rare" instances that merit it being held as a disproportionate crime. Because the crime is not

a "no account" check for $100.00 and not a sentence of life without possibility of parole, the government argues that Solem v. Helm, 463 U.S. 277, (1983), is inapplicable and thus Petitioner's claim is insubstantial. (Resp. 14-15).

Respondent, however, has failed to completely refute Petitioner's argument as to why this case is aberrational in nature and thus does merit review.

The crime, RICO, like Solem's habitual offense, is a recidivist type statute. Solem, however, had numerous prior criminal offenses that warranted applicability of a recidivist type statute. In contrast, Petitioner has no prior offenses, has no connection with organized crime and has an exemplary background. Additionally, the alleged offenses of Petitioner involve neither violence nor threat of violence to any person.

Petitioner noted in his initial Brief that the underlying offense was what made Solem's sentence of habitual offender cruel and unusual despite his repeated criminal conduct. Likewise here, the underlying offense of state bribery charges does not merit a twenty (20) year sentence.

The Respondent-government theorizes that if the Defendant had been sentenced pursuant to the Indiana Statute for bribery, he could have received an eighty-eight (88) year maximum sentence. Hence, the government claims that the twenty (20) years imposed on Defendant Goot is not disproportionate. This theorizing, however, lacks validity under Indiana Law.

In Indiana, the maximum sentence for bribery, a class C felony, is eight (8) years. The government's mathematical calculation of eleven (11) counts multiplied by eight (8) years to equal

eighty-eight (88) years. presupposes the possibility of a defendant being eligible for consecutive sentences. Indiana case-law allows imposition of consecutive sentences only where at least one of the statutory aggravating circumstances, as specified by statute, is in existence. The failure to find and to articulate an aggravating factor will reverse an order of consecutive sentences to one of concurrent sentences. (See Taylor v. State, 442 N.E.2d 1087, 1092 (Ind. 1982); see also, Hansford v. State, 490 N.E.2d 1083, 1094 (Ind. 1986).)

Indiana Code 35-38-1-7(d) lists the seven (7) aggravating factors. Defendant Goot does not meet any of these conditions. One might contend that imposition of a reduced sentence might depreciate the seriousness of the crime. Indiana Code 35-38-1-7(b)(4). This factor,

however, may only be considered as aggravation "for the limited purpose of outweighing mitigating factors when the judge would otherwise reduce or suspend the sentence." Cuttingham v. State, 469 N.E.2d 1, 7, 10 (Ind.App. Ct. 1984). This factor alone cannot be used to impose consecutive sentences as opposed to a concurrent sentence. Id. Thus, at most Defendant four under Indiana law, would face a penalty of eight (8) years and as such, the imposition of a twenty (20) year sentence is clearly disproportionate.

Respondent also argues that Defendant's sentence is comparable to two (2) other defendants in Operation Bar-Tab. (Resp. 15). Like Defendant, these two (2) others were sentenced by the Honorable James Moody of the Northern District of Indiana. Like Defendant, these two (2) other individuals availed themselves of

their constitutional right to trial. Two (2) repeated sentences by one (1) particular judge that are wrong do not make a rightful or proper situation. Omitted from Respondent's Brief is any refutation to the fact that if sentenced under the present federal sentencing guidelines, the Defendant would have been eligible to receive a sentence of twelve (12) to thirty-eight (38) months. (Pet. 21). Omitted from Respondent's Brief is any refutation to the fact that the 1986 United States Department of Justice, Bureau of Justice Statistics, show a sentence of 95.8 months as the average for racketeering. A sentence of two hundred forty (240) months is grossly disproportionate to that mean. (Pet. 21). Likewise omitted from Respondent's Brief is any refutation to the fact that the co-defendant, who did not avail himself of his Sixth Amendment right

to trial, received by this same judge, a sentence of four (4) years despite the government, by its own admission, arguing that the co-defendant was the more culpable individual. (Pet. 22). Finally, omitted from Respondent's Brief is the fact that not one attorney or judge, many of whom were convicted of a greater number of offenses in Operation Greylord, received a sentence comparable in height to Defendant-Petitioner's. (Pet. 20-21).

Respondent-government in their Brief does not address a key aspect of this issue of Petitioner's, that being, the fact that a jurisdictional disparity exists on whether a sentence necessitates reversal and remand when a trial judge fails to explain the rationale of his or her sentence. (Pet. 23-25). As noted by Petitioner in his initial Brief, this is now mandated as a result of the passsage of

the new sentencing act, 18 USC 3553 (c). (Pet. 23). Prior, however, to enactment of this act, the Second Circuit did remand a sentence where the court failed to specify its rationale for sentence. (See United States v. Golumb, 754 F.2d 86 (2nd Cir. 1985); see also United States v. Hutchins, 757 F.2d 11 (2nd Cir. 1985)). The Seventh Circuit, although noting this unwise practice, does not adopt the position of the Second Circuit. (Pet. 24, App. A.14).

Defendant-Petitioner in his initial Brief, noted that this procedural disparity warrants review by the Supreme Court to resolve the diverse practices within these two (2) jurisdictions. (Pet. 24-25). Not only is Petitioner deprived of due process rights in being sentenced without being provided the rationale for his receipt of the sentence, but likewise this practice

makes the sentence received that within the category of cruel and unusual. It is a combination of all of the aforestated factors that make Petitioner's case the exceedingly rare instance that does necessitate review.

CONCLUSION

For all of the foregoing reasons, herein and previously stated. this Petition for Certiorari should be granted.

Respectfully submitted,

ELLEN S. PODGOR
Attorney for Petitioner
5700 Collins Ave.
Apt. 10G
Miami Beach. FL 33140
Phone: (305) 868-3099